that *Biggers*' witness-certainty factor does not ensure or even correlate with the reliability of eyewitness identifications. As a result, state courts of last resort construing state due process guarantees have increasingly abandoned the *Biggers* framework—particularly the certainty factor—in favor of more sound measures of reliability. Federal courts—bound to apply *Biggers*' five-factor test until this Court says otherwise—have responded by dividing over the application and implications of the *Biggers*' witness-certainty factor. The disagreement expressed by state courts and the division within the federal courts counsel granting the writ.

A. State High Courts Applying Identical State Constitutional Provisions Have Rejected The Witness-Certainty Factor.

In state after state, courts of last resort presented with the issue are discarding *Biggers*' witness-certainty factor in light of the scientific consensus concerning its lack of relevance to accuracy. Recognizing the flaws in the empirical basis on which the witness-certainty factor rests, several state's high courts have rejected *Biggers* in its entirety and outlawed the use of unnecessarily suggestive identifications altogether. In *Commonwealth v. Johnson*, 650 N.E.2d 1257 (Mass. 1995), the Massachusetts Supreme Judicial Court held that the state constitution requires the *per se* exclusion of suggestive identifications, regardless of witness certainty. Likewise, in *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005), the Wisconsin Supreme Court abandoned its previous adherence to *Biggers*, and held that suggestive identification procedures are inherently unreliable and generally inadmissible. *Id.* at 593-94. And in *People v. Adams*, 53 N.Y.2d 241, 251-52 (N.Y. 1981), the New York Court of Appeals adopted a *per se* rule excluding suggestive out-of-court identifications.

Similarly, having first recognized that *Biggers*' witness-confidence factor is "based on assumptions that

are flatly contradicted by well-respected and essentially unchallenged empirical studies," *State v. Long*, 721 P.2d 483, 491 (Utah 1986), the Utah Supreme Court subsequently rejected *Biggers* as insufficient to guarantee due process under the Utah Constitution. Deeming *Biggers* to be "scientifically unsound," that court fashioned a more "empirically based" test of reliability that did not include witness certainty. *State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991). In doing so, it specifically rejected witness certainty "as an indicator of an identification's reliability." *Id.* at 781; *see also Long*, 721 P.2d at 490.

Most recently, in *Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005), the Georgia Supreme Court specifically rejected *Biggers*' witness-certainty prong, holding that administering a "level of certainty" instruction—informing jurors that they may consider a witness's level of certainty as a factor supporting "the reliability of [an] identification"—was reversible error. That court observed that "[i]n the 32 years since the decision in *Neil v. Biggers*, the idea that a witness's certainty in his or her identification ... reflected the witness's accuracy has been flatly contradicted by well-respected and essentially unchallenged empirical studies." *Id.* at 770 (internal quotations omitted).

Other state courts, while declining to abandon *Biggers*, have recognized its flawed analytical underpinnings and have expressed dissatisfaction with its witness-certainty prong. *See, e.g.*, *State v. Ledbetter*, 881 A.2d 290, 311 (Conn. 2005) ("The uncontradicted scientific literature ... suggests that the fourth *Biggers* factor is particularly flawed because a weak correlation, at most, exists between the level of certainty demonstrated by the witness ... and the accuracy of that identification."); *Jones v. State*, 749 N.E.2d 575, 586 (Ind. Ct. App. 2001) (recognizing "the growing body of scientific work which has challenged many commonly held beliefs about

eyewitness credibility"); *Rimmer v. State*, 825 So.2d 304, 337 (Fla. 2002) (Pareinte, J., dissenting in part) ("Since *Neil* [*v. Biggers*] was decided, additional social science research, as well as actual cases, have taught us much about the fallibility of eyewitness identification.").

Because this Court cannot review a state court's interpretation of a state constitution, and because the lower federal courts are bound by this Court's precedents, the Court will never be confronted with a decision squarely rejecting *Biggers*. Nonetheless, widespread repudiation of *Biggers* by the states is itself grounds for revisiting a decision that has proven to be fundamentally flawed. The federal courts should not be put in a position in which they are required to adhere to an outmoded judicially-crafted test while the state courts are trumpeting the empirical baselessness of that same test. Rather, *certiorari* is warranted where, as here, subsequent empirical knowledge has undermined the rationale of a decision. *See e.g., Payne v. Tennessee*, 501 U.S. 808 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989)); *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling in part *Swain v. Alabama*, 380 U.S. 202 (1965)); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)). The petition thus appropriately seeks, not error correction, but a correction in controlling law.

B. Although Bound By Precedent, Federal Courts Have Questioned *Biggers* Based On Compelling Scientific Evidence.

Federal appellate and district courts alike have expressed dissatisfaction with the witness-certainty prong of *Biggers*. These federal courts struggle to do justice within the *Biggers* framework, but are ultimately bound to follow this Court's precedent. For example, even though the Seventh Circuit has acknowledged that "[d]eterminations of the reliability suggested by a

witness's certainty after the use of suggestive procedures are complicated by the possibility that the certainty may reflect the corrupting effect of the suggestive procedures," it has obligingly adhered to *Biggers* in the criminal law context. *United States ex. rel. Kosik v. Napoli*, 814 F.2d 1151, 1159 (7th Cir. 1987). However, in other contexts, the Seventh Circuit has repudiated the premise underpinning *Biggers*' witness-confidence prong. In *Krist v. Eli Lilly & Co.*, 897 F.2d 293, 296 (7th Cir. 1990), that court observed that "[a]n important body of psychological research undermines the lay intuition that confident memories of salient experiences ... are accurate." It further noted that "certitude is not a reliable test of certainty," and that "the mere fact that we remember something with great confidence is not a powerful warrant for thinking it true [because] accuracy of recollection is *not* highly correlated with the recollector's confidence." *Id.* at 297 (emphasis in original).

The Seventh Circuit's skepticism towards witness certainty and eyewitness recollection is not unique. In *Grayer v. McKee*, 149 Fed. Appx. 435 (6th Cir. 2005), the court of appeals recognized that social science studies "demonstrate that there is *no correlation* between the confidence of the witness and the accuracy of the identification," and expressed "concerns about the reliability of identification" made in that case. *Id.* at 447-48 (emphasis added). Nonetheless, the court adhered to the "established precedent" of *Neil v. Biggers*, finding that even in a "close case," if a witness said he was "certain" of his identification, the "level of certainty" factor supports the reliability of the identification and, thus, admission of it as evidence. *Id.* at 448. In *Abdur-Raheem v. Kelly*, 98 F. Supp. 2d 295, 306-07 (E.D.N.Y. 2000), *rev'd on other grounds*, 257 F.3d 122 (2d Cir. 2001), the court argued that "[b]ased on empirical research into eyewitness identifications" the witness-certainty factor should be given little weight because it "assign[s] too much predictive value to eyewitness confidence and also to

witnesses' descriptions, neither of which is very predictive of identification accuracy in scientific studies."

Other judges have expressed similar concerns over application of *Biggers'* witness-confidence prong, all the while adhering—as they must—to precedent. *See, e.g.*, *United States v. Singleton*, 702 F.2d 1159, 1179 (D.C. Cir. 1983) (Wright, J., dissenting) ("[I]nnumerable authorities have concluded that a witness'[s] degree of certainty in making an identification generally does not measure its reliability. Indeed a *negative* correlation sometimes exists between a witness'[s] confidence and the accuracy of the identification.") (emphasis in original); *Ocasio v. Artuz*, No. 98-CV-7925 (JG), 2002 WL 1159892, *10 n.7 (E.D.N.Y. May 24, 2002) ("[I]n truth, social science has convincingly revealed that there is little or no correlation between an eyewitness'[s] confidence in an identification and the accuracy of the identification.") (citing psychological research); *Smith v. Smith*, No. 02 Civ. 7308 (WHP) (JCF) 2003 WL 22290984, *11-12 (S.D.N.Y. Sept. 29, 2003) ("Studies have indicated that the empirical evidence does not support the idea that eyewitness confidence is a valid measure of eyewitness accuracy under ecologically valid conditions. [One reason for this phenomenon] is the extreme malleability of eyewitness confidence.") (internal citation and quotation marks omitted).

In this case, Petitioner Perez requested that the Second Circuit reject *Biggers'* witness-certainty factor in light of the academic consensus that there is little, if any, correlation between the certainty expressed by a witness and the accuracy of an identification. At oral argument, the Second Circuit agreed that reliability of *Biggers'* witness-certainty factor presented an interesting question and lamented the fact that jurors were typically denied information on how frequently firm identifications turn out to be false. It noted, however, that it was bound by

this Court's precedent and had no authority to overrule *Biggers* or modify its five-factor test.

These cases demonstrate the discontent in the lower federal courts and the pressing need for this Court to step in and revisit its own precedent.

C. Federal Courts Are Divided Over The Integrally Related Issue Of Expert Testimony Concerning Eye-Witness Reliability.

Biggers not only established an unscientific test that federal courts must apply with willful blindness, but has led some courts to exclude expert evidence challenging the reliability of eyewitness identifications. The circuits disagree over whether and in what circumstances *Biggers* permits such expert testimony, with many often excluding such evidence precisely because it challenges reliance on a witness's certainty regarding his identification. Thus, the lower courts are divided over use of *Biggers*' witness-certainty factor to exclude what is empirically sound evidence about eyewitness identifications.

For example, in *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999), the Second Circuit excluded a "plainly qualifie[d] expert" from testifying about admittedly scientifically reliable evidence. Although the district court certified the defendant's expert and recognized the scientific reliability of the proffered testimony, it nonetheless refused to allow testimony on the accuracy of witness confidence because it might confuse or mislead the jury. *See id.* at 288-89. The Second Circuit affirmed. *Id.* Likewise, in *United States v. Smith*, 156 F.3d 1046, 1052-53 (10th Cir. 1998), the district court refused to allow, and the Tenth Circuit refused to require, expert testimony regarding eyewitness identifications. In *United States v. Holloway*, 971 F.2d 675, 679 (11th Cir. 1992), the Eleventh Circuit found defendants' argument that the trial court abused its discretion by refusing to admit an expert in eyewitness identification entirely "without merit." Other courts have

reached similar conclusions. *See United States v. Rincon*, 28 F.3d 921, 926 (9th Cir. 1994) (upholding the district court's exclusion of expert eyewitness identification testimony); *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) (same).

In their effort to apply *Biggers* faithfully, these courts have missed the fundamental concern over the admission of suspect eyewitness identifications. Simply put, jurors routinely *overestimate* the value of eyewitness confidence. As the Third Circuit has observed, the fact that "witnesses ofttimes profess considerable confidence in erroneous identifications is fairly counterintuitive." *United States v. Stevens*, 935 F.2d 1380, 1400 (3d Cir. 1991). Indeed, "perhaps it is precisely because jurors do not appreciate the fallibility of eyewitness testimony that they give such testimony great weight." *Ramirez*, 817 P.2d at 780-81 (internal quotation omitted); *see also Hager v. United States*, 856 A.2d 1143, 1147, 1149 (D.C. 2004) ("[I]t cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror.").

Recognizing the need for expert testimony on the relationship between eyewitness confidence and accuracy, at least one court of appeals has permitted such expert evidence. *Stevens*, 935 F.2d at 1400-01 (reversing exclusion of expert testimony on the accuracy of witness confidence). Despite finding that identification evidence admissible under *Biggers* because of witness confidence, *see id.* at 1391, the Third Circuit held that the defendant was entitled to introduce expert evidence challenging the correlation between confidence and accuracy, *see id.* at 1400-01. Other courts have reached similar conclusions, albeit more narrowly. In *United States v. Harris*, 995 F.2d 532 (4th Cir. 1993), the defendant proffered expert testimony to show that post-identification discussions among witnesses could have strengthened the confidence in their identifications. The Fourth Circuit held that in

certain, limited circumstances, expert testimony on eyewitness confidence could be admissible. *See id.* at 535 ("The narrow circumstances held sufficient to support the introduction of expert testimony have varied but have included such problems as cross-racial identification, identification after a long delay, identification after observation under stress, psychological phenomena as the feedback factor and unconscious transference.").

The unwarranted extension of *Biggers* to exclude admittedly scientific testimony by acknowledged experts is doubly troubling in that it not only permits the admission of questionable identification evidence, but then uses the rationale behind that admission to exclude a defendant's reliable scientific evidence. Ironically, this Court has itself acknowledged that the suggestive identification techniques typically at issue in a *Biggers* analysis may increase witness certainty while inherently diminishing reliability—yet many lower courts have effectively deprived the jury of that knowledge in the name of precedent. *See Manson v. Brathwaite*, 432 U.S. 98, 111-12 (1977) (explaining that suggestive identification techniques are themselves highly influential on a witness); *Simmons v. United States*, 390 U.S. 377, 383-84 (1968) (holding that a witness "is apt to retain in his memory the image of the [misidentified] photograph rather than of the person actually seen"); *see also Napoli*, 814 F.2d at 1159 ("Determinations of the reliability suggested by a witness's certainty ... are complicated by the possibility that the certainty may reflect the corrupting effect of the suggestive procedures."); *Dubose*, 699 N.W.2d at 592 ("Because a witness can be influenced by the suggestive procedure itself, a court cannot know exactly how reliable the identification would have been without the suggestiveness.").

The fact that the lower federal courts are split on the implications of *Biggers* is further reason for this Court to

grant the writ. Rather than allow the lower courts to continue to divide over the admissibility of the science that contradicts the *Biggers*' witness-certainty factor, this Court should squarely address the empirical evidence and revisit the core issue of reliability in admission of eyewitness identifications.

II. PRINCIPLES OF *STARE DECISIS* SUPPORT RECONSIDERATION OF *BIGGERS*' WITNESS-CERTAINTY PRONG.

This Court's jurisprudence on *stare decisis* weighs strongly in favor of revisiting *Biggers*' witness-certainty factor. When the "necessity and propriety" of overruling a prior decision has been established, the Court has not hesitated to act. *Ring v. Arizona*, 536 U.S. 584, 608 (2002) (internal quotation omitted). Indeed, "[w]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne*, 501 U.S. at 828 (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). All four of the factors this Court weighs when reexamining a prior precedent—workability, reliance, subsequent development of the law, and whether changed facts have "robbed the old rule of significant application or justification," *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992)—suggest that this Court should reconsider and reject the witness-certainty prong of *Neil v. Biggers*.

A. Scientific Research And Subsequent Developments In the Law Have Robbed The Witness-Confidence Factor Of "Significant Application Or Justification."

The touchtone of *Biggers* is reliability. The problem with the witness-certainty prong of *Biggers*, however, is the ensuing scientific consensus that witness certainty has nothing to do with reliability. Empirical evidence has established beyond reasonable dispute that the extent to which a witness is certain of an identification has, at best, a weak correlation to the accuracy of that identification

and, at worst, no correlation at all, or even a negative correlation. *See* Pet. 4-12. A number of factors other than accuracy often more powerfully influence the certainty of a witness's memory including: the violence of the event, the presence of a weapon, and expectations based on cultural biases and past experiences. *See* Elizabeth Loftus, *Eyewitness Testimony* 31-51 (1979). Studies also show that witness-certainty is easily manipulated and often affected by post-identification events that have nothing to do with a witness's memory. *See, e.g.*, Amy L. Bradfield, et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002). At the same time, research shows that fact-finders place a disproportionate weight on the confidence of the witness in their reliability analysis. As one study explained: "Jurors appear to overestimate the accuracy of identifications, fail to differentiate accurate from inaccurate eyewitnesses—because they rely so heavily on witness confidence, which is relatively nondiagnostic—and are generally insensitive to other factors that influence identification accuracy." Wells, *Recommendations for Lineups and Photo Spreads*, *supra*, at 624; *see also Ramirez*, 817 P.2d at 780 (noting the "common knowledge that people do possess [regarding eyewitness accuracy] often runs contrary to documented research findings").

In short, the empirical foundation upon which the witness-confidence prong of the *Biggers* decision was built is no longer grounded in science (if, indeed, it ever was). When the underlying empirical basis for a decision is so clearly called into question, *stare decisis* does not bar its reconsideration. Indeed, "the notion that an important constitutional decision with *plainly inadequate rational support* must be left in place for the sole reason that it once attracted five votes" is unacceptable. *Payne*, 501 U.S. at 834 (Scalia, J., concurring) (emphasis modified).

This is not the first case where the Court has been asked to update legal principles in accordance with empirical understanding. In *Payne*, for example, this Court granted *certiorari* specifically "to reconsider [its] holdings in *Booth* and *Gathers* that the Eighth Amendment prohibits a capital sentencing jury from considering 'victim impact' evidence." 501 U.S. at 817. In overruling those prior decisions, the Court reasoned that "*Booth* and *Gathers* were based on two premises" that had subsequently proven faulty. *Id.* at 819. Likewise, in this Court's landmark decision in *Brown v. Board of Education*, the Court found that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*," it had been supplanted by "modern authority." 347 U.S. at 494. Accordingly, the Court rejected *Plessy* and its faulty premise. *Id.* Where a previous holding is "wrong" as an empirical matter, that decision should be reconsidered and corrected. *See Payne*, 501 U.S. at 825; *Brown*, 347 U.S. at 494-95. So too here.

B. Revisiting The Witness-Confidence Factor Would Not Impose Any Special Hardship Because Reliance Interests Are Not At Stake.

Revisiting any of the *Biggers* factors will not impose any "special hardship" based on reliance. *Casey*, 505 U.S. at 854. Although "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved, the opposite is true in cases such as the present one involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828. So too here. As this Court noted in *Payne*, reconsideration and reexamination of old precedent is of particular importance where that precedent may incorrectly exclude evidence thus "prevent[ing] the jury from having before it all the information necessary to determine the proper punishment." *Id.* at 825. Obviously the government has no reliance interest in seeing

defendants convicted on the basis of unreliable eyewitness evidence.

C. The Witness-Confidence Prong Is Not Workable In Any Meaningful Sense.

Although it is true that witness "certainty" can be ascertained fairly easily—by simply asking a witness—this factor is only superficially workable. Workability requires more than mere ease of application; it requires that a factor actually "work" by serving as an accurate proxy. But witness confidence is no predictor of accuracy.

Decisions that cannot be squared with modern scientific knowledge and unquestioned empirical evidence diminish public confidence in our legal system. Indeed, a "decision contrary to the public sense of justice ... operates, so far as it is known, to diminish respect for the courts and for law itself." *Payne*, 501 U.S. at 834 (Scalia, J., concurring) (internal quotation omitted). Here, continued application of *Biggers*' witness-certainty factor—supported by nothing more than judicial fiat—would amount to "stunning *ipse dixit*" that certainty is relevant to accuracy when, in fact, it is not. *Id.* Little could "conflict[]" more "with a public sense of justice." *Id.*

III. THE PERVASIVE APPLICATION OF *BIGGERS*' WITNESS-CERTAINTY FACTOR DEMANDS REVIEW.

The role of the *Biggers* factors in admitting otherwise inadmissible eyewitness testimony is not a matter of minor academic interest. Trial courts in the state and federal systems rely on *Biggers* almost daily to admit or exclude evidence. Suffice it to say that even a cursory review of a legal database such as Westlaw or Lexis-Nexis reveals *thousands* of citations of *Biggers*.

No issue in criminal law today is of more pressing importance in terms of preventing wrongful convictions. Eyewitness misidentification is now the single greatest source of wrongful convictions in the United States and

responsible for more wrongful convictions than *all* other causes combined. *See* Wells, *Recommendations for Lineups and Photospreads*, *supra*, at 6. Indeed, a Justice Department survey revealed that 85% of erroneous convictions occurred primarily because the defendant had been misidentified by a witness. National Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, DOJ Pub. No. NCJ 161258, 16-17 ex.3 (1996). In that study, the authors identified and reviewed twenty-eight cases where convicted defendants were exonerated by DNA evidence and concluded that "[i]n the majority of the cases, given the absence of DNA evidence at the trial, eyewitness testimony was the most compelling evidence." *Id.* at 24.

That trial courts are called upon to apply the witness certainty factor on an almost daily basis is especially troubling for three reasons. *First*, a *Biggers* analysis only occurs *after* the trial court has determined that a witness identification would otherwise be constitutionally inadmissible. Only where an identification is tainted—because of an improper line-up, show-up, photo array, or other impermissibly suggestive procedure—does a trial court conduct a second-tier reliability analysis. To satisfy the second inquiry, the court determines whether the identification is reliable *independent* of the unduly suggestive identification procedure. The use of the certainty factor in this second-tier analysis is troubling because that factor has been shown—beyond reasonable dispute—to be uncorrelated to accuracy. *Second*, as noted above, the use of the witness certainty factor in this second-tier analysis is even more disturbing because a suggestive identification technique may itself increase witness certainty. *See supra* at 11. *Third*, even though research has shown that witness certainty bears little, if any, relation to the accuracy of an identification, courts often refuse to look behind the words of a witness who says that he or she is "certain." Many courts require

nothing more than superficial certainty. *See, e.g.*, *Napoli*, 814 F.2d at 1160.

A few real-world examples highlight the perniciousness of the certainty factor. Take, for example, *United States v. Smith*, 156 F.3d 1046. In that case, the pre-trial identification procedures were unquestionably suggestive. The photo array was too limited because it contained only four or five photos (six is considered small enough to weigh heavily against admissibility) and the manner of presentation was rife with errors: names were on the photographs; the agent in charge told witnesses that they had picked the correct photo; each photo was signed and dated by each witness—so that each subsequent witness saw the signatures of his or her co-employees on the defendant's photo; and one witness was shown a mug shot of the defendant and told "off the record" that the defendant was the suspect. *Id.* at 1050-51. One witness was at first unable to identify the suspect. It was only after the agent left the witness alone with the loose photos, one of which had been signed and dated by his co-workers, that the witness identified the defendant. *Id.* At trial, however, that witness testified that he "was real, real sure" of his identification. *Id.* at 1052. Yet, even in these circumstances, the trial court found this self-professed "certainty" sufficient and the Tenth Circuit affirmed; the certainty factor of *Neil v. Biggers* thus supported the admissibility of an unquestionably unreliable pre-trial identification. *Id.*

In *Grayer v. McKee*, only one witness was able to link the defendant to a carjacking. *See* 149 Fed. Appx. at 438-39. After an indisputably suggestive identification, the court reviewed the *Biggers* factors and found the identification admissible. The Sixth Circuit affirmed. It found that the witness "did not have a good opportunity to view the carjacker" because the witness had an impeded view and only a "short period" to observe the defendant. *See id.* at 445-46. Moreover, according to the court, the

witness has been somewhat "distracted," *id.* at 446; her description was "implausible," *id.* at 445, and at "least partially inaccurate," *id* at 447. Nonetheless, the Sixth Circuit concluded that the witness's identification "exhibited a high level of certainty, which *under established precedent*, supports the reliability of her identifications." *Id.* at 448 (emphasis added).

In this case, after the eyewitness—himself a defendant cooperating with the government—indicated that a person with "dark skin" had paid for a murder-for-hire, the witness was shown a photo array of eight individuals. Pet. 2. Only one of the subjects—Petitioner Jose Perez—had dark skin. *Id.* The district court relied on the eyewitness's certainty of his out-of-court identification and the Second Circuit affirmed. As courts are called on to apply *Biggers* every day, such stories are legion. *See Napoli*, 814 F.2d at 1160 (holding that the failure of witnesses to pick the defendant out of a line-up and photoarray did not necessarily "or even normally, make the later identification less certain"); *cf. Brodes*, 614 S.E.2d at 768 (rejecting application of *Biggers* while noting that a witness who was unable to give the police *any* physical characteristics of the perpetrator later testified that he was "absolutely certain" and "dead certain" of his identification).

* * *

When a constitutional decision leaves our courts in a position of willful blindness to evolving knowledge it should be corrected. Here, the Court confronts "a wrongly decided, unworkable precedent calling for some further action" and should not "compound the original error" by ignoring it, but should directly confront it. *Payne*, 501 U.S. at 842-43 (Kennedy, J., concurring). Following this course here "has itself the support not only of precedent but of practical sense as well." *Id.* at 844. *Amicus curiae* NACDL therefore respectfully requests that the Court

grant *certiorari* to reconsider and overrule *Neil v. Biggers* to the extent that it is inconsistent with the core principles of this Court's identification jurisprudence.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

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No. 05-596

In the Supreme Court of the United States

JOSE ANTONIO PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONER

Reasonable people might disagree about whether or under what circumstances this Court should promulgate binding, multi-factor tests, such as the one at issue here. But it ought to be beyond dispute that if and when this Court does so, the test should clearly accomplish its intended purpose. Concomitantly, lower courts should not be required to persist in employing a test whose empirical basis has, with the passage of time, been shown to be of dubious validity.

The government's main argument for retaining the witness-certainty test from *Neil* v. *Biggers*, 409 U.S. 188 (1972)—beyond a few "vehicle" contentions which, as we show below, are entirely without merit—is that a handful of studies exist that run counter to the prevailing view that the certainty factor is not an appropriate measure of an identification's reliability. The government's approach in essence establishes a presumption that would keep in place virtually indefinitely a standard that has long since been discredited by the great weight of authority.

The government's suggestion that the existence of a few outlying studies warrants retention of the witness-certainty factor should be rejected. Instead, the witness-certainty factor should be removed from the list of mandatory criteria that lower courts must consider when assessing the reliability of suggestive identifications.

The importance of the issue could not be greater. As the Innocence Network notes in its amicus brief in support of certiorari (at 16), mistaken identifications played a part in *over 75%* of known convictions for which the individual was later exonerated by DNA evidence. The *Biggers* witness-certainty factor is scientifically unsound, has been widely rejected, and leads to the conviction of innocent defendants. The continued admissibility of unreliable eyewitness evi-

dence undermines the integrity of the criminal justice system and subverts the twin goals of law enforcement: convicting the guilty and protecting the innocent. The petition should be granted.

I. *Biggers*'s Witness-Certainty Test Is Unsound.

The intuitive notion that courts should be more willing to allow into evidence an eyewitness identification when the witness is confident as to that identification is unsound. The government's counterarguments (Br. in Opp. 8–12) are largely based on a misinterpretation of our argument.

We do not argue that there is "'*no*' relationship" between witness certainty and accuracy of identification (Br. in Opp. 9 (quoting *Commonwealth* v. *Cruz*, 839 N.E.2d 324, 331 (Mass. 2005) (emphasis added)). As we acknowledge in the petition (at 6–7), some research shows that there may be a slight relationship between the two, such that a witness who is more certain as to an identification is somewhat more likely to be accurate in that identification. Other research has found there to be no correlation or has even found there to be a *negative* correlation. See Pet. 6. This variation alone is a sufficient basis for granting the Petition and removing the witness-certainty factor from *Biggers*. Lower courts should not be *required* to apply a standard that even the government would have to concede is not broadly and consistently viewed by the experts as reliable.

This is quite unlike a situation in which a *legal* question is subject to differing answers and thus amenable to further "percolation" in the lower courts. Here it is plain that, at a minimum, the witness-certainty factor is of dubious scientific validity. In these circumstances there is no justification for continuing to require lower courts to apply it.

Moreover, although it would be impractical (and probably unwise, from the standpoint of institutional competence) for petitioner or the government to ask this Court to undertake an independent assessment of the underlying science,

the evidence to which the government points is weak. For example, while the Wells and Olson article on which the government heavily relies notes that a meta-analysis by Sporer found a correlation between certainty and accuracy, it comments that it is "unclear" whether the result of this "meta-analysis of experiments can be directly applied to actual cases in which there are other influences that inflate the certainty of eyewitnesses." See Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANNU. REV. PSYCHOL. 277, 284 (2003), *available at* http://www.psychology.iastate.edu/-faculty/gwells/annual_review_2003.pdf. And the sentence from the Mayer article quoted in part by the government (at 9–10 n.*) actually states in full that "[a] *few* studies show that confidence level is a valid predictor of identification accuracy, while *many* others demonstrate that there is no correlation between certainty and reliability of the identification." Connie Mayer, *Due Process Challenges To Eyewitness Identification Based On Pretrial Photographic Arrays*, 13 PACE L. REV. 815, 852–53 (1994) (emphasis added).

The simple fact is that, even if there did turn out to be some small correlation between certainty and accuracy, it is—on the government's own studies—sufficiently weak that it is likely to be misleading in a wide range of cases. Where else do we systematically draw judges' and jurors' attention to indicia that *even at best* have error rates of 30%? And where else do we draw attention to such a problematic indicator without providing the jury information about just how problematic an indicator it is?

Requiring the certainty factor to be considered leads to far too many "false positive" results, in which juries give excessive credence to a confident but inaccurate identification. It makes no sense to continue dong so. This Court should revisit *Biggers* and excise this scientifically and constitutionally problematic factor from the admissibility analysis.

II. The Fact That No Court Has Expressly Refused To Follow *Biggers* In No Way Undermines The Case For Certiorari.

The government argues (Br. in Opp. 12–13) that certiorari is unwarranted because there is no division of authority in the lower courts. That is a red herring. As we explained in our petition, there can be no circuit split or other express division among the lower courts in this situation. As the government recognizes (*id.* at 12), the lower courts cannot overturn *Biggers*, and cannot ignore this Court's holding in that case that witness certainty must be considered in deciding whether the admission of evidence violates the federal Due Process Clause.

It would make no sense for this Court to wait in vain for the lower courts to engage in lawless insurrection before granting review. And in fact state courts and lower federal courts have held that the empirical premise on which *Biggers* rested—the notion that witness certainty is substantially correlated with accuracy—has no basis. See Pet. 12–16.

While avoiding direct conflict with *Biggers*, as they must, state and federal courts alike have made plain their lack of confidence in the decision. Many of the state courts that have rejected the *Biggers* rule as a matter of state constitutional law have done so under general principles of due process contained in state constitutions. See Pet. 13–15 (discussing the holdings of *State* v. *Ramirez*, 817 P.2d 774, 780–781 (Utah 1991) (holding *Biggers* test is insufficient guarantee of due process under the Utah Constitution and adopting a "more empirically based" test); *Commonwealth* v. *Johnson*, 650 N.E.2d 1257, 1260–1261 (Mass. 1995) (state constitution requires *per se* exclusion of unnecessarily suggestive identifications); *State* v. *Dubose*, 699 N.W.2d 582, 593–596 (Wis. 2005) (adopting a *per se* exclusion of unnecessarily suggestive line-ups unless the procedure was necessary under the totality of the circumstances)). Other state and federal

courts that have addressed the witness-certainty factor in contexts other than pre-trial admissibility hearings—and thus in instances in which *Biggers* is not controlling—have also been extremely critical of the witness-certainty factor.[1]

These courts have all recognized *Biggers*' shortcomings. But only this Court can reconsider *Biggers* as a matter of federal constitutional law. There is no reason to wait any longer to do so.

III. Petitioner's Claim Was Adequately Presented Below.

The government argues (Br. in Opp. 13–15) that certiorari should be denied because petitioner's challenge to *Biggers* was not adequately presented to or preserved in the court of appeals. That assertion is flatly incorrect. Petitioner's opening brief in that court explicitly raised the issue, arguing that

> the continuing viability of [the witness-identification] factor has been called into serious question by the numerous reported DNA exonerations of people who had been convicted, many of capital felonies, based on eyewitness identifications by people who were quite certain, but were nonetheless wrong.

2d Cir. Br. 47. The argument was reiterated in petitioner's reply brief in that court, which explained that the government

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[1] See, *e.g.*, *Brodes* v. *States*, 614 S.E.2d 766, 771 (Ga. 2005) (holding that trial courts should not instruct juries to consider the witness's level of certainty "when instructing them on the factors that may be considered in deciding the reliability of [an] identification"); *State* v. *Ledbetter*, 881 A.2d 290, 311 (Conn. 2005) (criticizing the witness certainty factor as "particularly flawed because a weak correlation, at most, exists between the level of certainty demonstrated by the witness * * * and the accuracy of that identification). See also Pet. 14–16.

had failed to respond to the claim that the certainty factor was no longer viable and should be rejected "in light of currently-available scientific research demonstrating that there is virtually no correlation between the *certainty* expressed by a witness and the accuracy of the [sic] his/her identification." 2d Cir. Reply Br. 12.

In fact, at oral argument in the Second Circuit, both parties argued about the viability of the certainty factor. The government did not claim that petitioner had waived the issue. Instead, it asserted that petitioner had raised "an interesting argument, [but] really not an argument that can be made here. * * * Ultimately what defense counsel is asking [the Second Circuit] to do is to overrule *Neil* v. *Biggers*, which, obviously, is something that would put [that] court in difficult straits."[2]

Judge Calabresi, too, specifically noted that this issue was presented by petitioner's appeal but was not one on which the Second Circuit could grant relief. Defense counsel argued that "certainty has no relation to accuracy and I don't think the Court can ignore the scientific evidence that's now available." In response, Judge Calabresi asked, "But can we bring *Biggers* into question, or is that something that only the Supreme Court can do?" A member of the panel appeared to agree that the certainty factor is problematic, noting that it is "interesting that it isn't generally allowed to let a jury know just how frequently firm identifications turn out to be false." And Judge Calabresi went on to note that, while trial courts might be able to scrutinize *Biggers* presentations with care,

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[2] The Second Circuit does not transcribe oral arguments, but audiotapes are available from that court. After consulting with the Supreme Court clerk's office, in this brief we quote from our informal transcript of relevant portions of the oral argument. However, we would be glad to have the oral argument formally transcribed in its entirety were the Court to request it.

and "the Supreme Court could change the rule * * * arguably the one court that can do very little about that is the court that's in the middle"—the court of appeals.

Thus, the briefs and argument below clearly addressed the claim presented in the petition, and in any event the government has waived any objection by arguing the issue below without suggesting that it was not properly raised. The Second Circuit's opinion is merely a straightforward application of *Biggers*, which—as the Second Circuit itself noted at oral argument—can be corrected only by this Court.[3]

IV. The Government's Speculation That The District Court Might Have Admitted The Eyewitness Identification Evidence Even Without Relying On The Witness Certainty Factor Is Unsupported And No Cause To Deny Review.

The government also contends that this case is an improper vehicle for considering the question presented because, it asserts, there is "little doubt" that the district court would have admitted the identification evidence even if that court had not considered the witness's certainty in his identification. See Br. in Opp. 15. That claim should be rejected, for two reasons.

First, this is sheer speculation on the part of the government. Neither the government nor this Court can know how

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[3] It is unsurprising that the Second Circuit did not specifically discuss the viability of the certainty factor in its summary order, because that court is, of course, "well aware of the Supreme Court's admonition that if a Supreme Court precedent has direct application in a case before us, but rests on reasons [subsequently eroded], [the lower court] should follow the directly controlling case and leave to the Supreme Court the prerogative of overruling its own decisions." *United States* v. *Logan*, 419 F.3d 172, 180–181 (2d Cir. 2005) (quoting *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks omitted)).

the district court would have weighed the remaining factors in assessing this concededly suggestive identification had it not been able to consider the witness's certainty in deciding whether to admit his testimony.[4] Thus, the appropriate course of action is for this Court to grant review to determine whether that factor should be considered *at all*, leaving it to the lower court, if necessary, to reweigh the various factors relevant to admissibility *after* this Court's review.

Second, the government's speculation that the witness-certainty factor might not have affected the admissibility of the eyewitness testimony in this case could be made in *every* case in which witness certainty is at issue. Thus, given the frequency with which eyewitness testimony is critical in criminal cases (see NACDL Amicus Br. 15–19; Innocence

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[4] The district court found that the huge, five-year lapse between the crime and the unconstitutionally suggestive identification procedure was "counterbalance[d]" by the other four *Biggers* factors, including the witness certainty factor. Pet. App. 19a. In particular, the court found that Lopez had a "significant opportunity" to view petitioner (*id.* at 16a), that his degree of attention added "somewhat to the reliability of his identification" (*id.* at 17a), that the accuracy of his description weighed "slightly in favor" of reliability (*id.* at 18a), and that he had a "significant level of certainty" in his identification (*id.* at 19a).

The government asserts that the district court "appears to have placed the greatest weight" on the opportunity Lopez had to view the owner of the auto shop (Br. in Opp. 16), but that is pure speculation. What we do know from the district court's opinion is that it weighed the positive factors *together*. Pet. App. 19a. More importantly, that court found that both the witness's opportunity to view the owner of the auto shop and his level of certainty were "significant" factors in favor of finding reliability. *Ibid.* Because the court found that Lopez's level of certainty was a "significant" factor in favor of finding the identification reliable, the government cannot reasonably argue that it knows whether the lower court would have admitted the identification absent that factor.

Network Amicus Br. 16–19), and the evidence suggesting that eyewitness certainty is a highly problematic factor, the government's speculation provides no reason not to grant review and revisit *Biggers* now, before more innocent defendants are convicted based on evidence that should have been excluded.

V. The Admission Of The Eyewitness Identification Evidence In This Case Was Not Harmless Error.

The government's final argument is that the Court should not grant certiorari to consider the validity of the witness-certainty factor because, even if the identification evidence had been excluded, "there is little doubt" that petitioner would nonetheless have been found guilty based on other evidence. See Br. in Opp. 16. This argument is baseless.

In order for the government to prevail on its harmless error argument, it must demonstrate that the admission of the identification evidence was "harmless *beyond a reasonable doubt*." *Chapman* v. *California*, 386 U.S. 18, 24 (1967) (emphasis added); see also *Neder* v. *United States*, 527 U.S. 1, 15 (1999); *United States* v. *Wade*, 388 U.S. 218, 242 (1967). Particularly given the weight jurors place on eyewitness testimony (see, *e.g.*, ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 9–11 (1996) (finding that in a study of 150 mock jurors, 68% who heard eyewitness testimony with cross-examination voted guilty compared with 18% who did not hear such testimony)), the government cannot conceivably meet that burden based on the evidence in this record.

In this case, the eyewitness identification was persuasive evidence linking petitioner to the crime because the witness, Mario Lopez, identified petitioner as the "owner" of the auto shop who, he said, repeatedly attempted to call the victim to lure him to the shop. Gov't 2d Cir. Br. 15, Tr. 1289–1290. Of course, the government acknowledges that petitioner was *not* the "owner" of the auto shop. See Br. in Opp. 3 (Perez Auto owned by Wilfredo Perez, not petitioner).